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11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,)	Criminal Case No. <u>08CR0918-L</u>
Plaintiff,)	GOVERNMENT'S MOTION IN LIMINE TO
v.)	INTRODUCE BUSINESS RECORDS
FE S. GARRETT)	Fed. R. Evid. 803(6) and 902(11)
Defendant.)	
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)	

The United States, by and through its counsel Karen P. Hewitt, United States Attorney, Christopher S. Strauss and Elizabeth C. Hadden, Special Assistant United States Attorneys hereby submits its Motion in Limine to Introduce Business Records. The United States respectfully moves the Court to rule, pursuant to Federal Rule of Evidence 104, that the government exhibits listed in the table below are admissible as business records pursuant to Federal Rule of Evidence 803(6) and that the below business records are authentic because they have been certified pursuant to Federal Rule of Evidence 902(11). A copy of the certification^{1/} for each exhibit is attached to this motion as

^{1/}The Comerica Bank records were provided on April 23, 2008. We are waiting for the certification to be completed. The certification should be completed and provided on August 25, 2008
(continued...)

1 Exhibit 1. A pretrial ruling to this effect will permit the trial to proceed more efficiently and
 2 expeditiously, and will prevent inconvenience to witnesses who would be traveling from out of state
 3 for the sole purpose of authenticating business records.

4 The following documents^{2/} are admissible records of regularly conducted activity pursuant to
 5 Federal Rule of Evidence 803(6) and all are certified by a written declaration by a custodian or other
 6 qualified person certifying pursuant to Federal Rule of Evidence 902(11) that the documents 1) were
 7 made at or near the time of the occurrence of the matters set forth by or from information transmitted
 8 by a person with knowledge of those matters; 2) were kept in the course of the regularly conducted
 9 activity; and 3) were made by the regularly conducted activity as a regular practice:

Bates-Stamp Range	Business Records Description
FG-BK-BOA82-95	Bank of America, Pages: 00004- 00228 (FE SIMBAJON GARRETT / GARRETT'S REALTY & MORTGAGE)
	Bank of America, 01713-09955 (FE SIMBAJON GARRETT / GARRETT'S REALTY & MORTGAGE)
FG-BK-COM466	Comerica Bank, Pages: 00001 - 00088 (FE S GARRETT DBA GARRETT'S REALTY & MORTGAGE)

24 ^{1/}(...continued)

25 or August 26, 2008. The documents from Sierra Pacific Mortgage certification was provided to the
 government on August 22, 2008 and is being provided to defendant contemporaneously.

26 ^{2/}All of these documents are the underlying admissible evidence for which the Federal Rule of
 27 Evidence 1006 summaries are based. The notice for the Federal Rule of Evidence 1006 summaries was
 filed on July 31, 2008.

28 Government's Motion in Limine to
 Introduce Business Records

1	FG-BK-NICU-00-	North Island Federal Credit Union,
2	50	97339550
3	Pages: 0002 - 1822	(G M GARRETT)
4		
5		North Island Federal Credit Union, ,
6		97339500
7		(G M GARRETT)
8	FG-BK-NICU52	North Island Federal Credit Union,
9		0114708052
10	Pages: 00002 -	(GARRETT'S REALTY AND MORTGAGE)
11	00773	
12	FG-BK-SWCB059	Southwest Community Bank,
13	Pages: 00003 -	51004059
14	00409	(FE S GARRETT DBA GARRETT'S REALTY & MORTGAGE)
15	FG-BK-SWCB506	Southwest Community Bank,
16	Pages: 00001 -	50004506
17	00082	(FE S GARRETT)
18	FG-BK-	Washington Mutual Bank,
19	WAMU790	389-623079-0
20	Pages: 00002 -	(FE S GARRETT TRUSTEE FOR GREGORY GARRETT)
21	00039	
22	FG-BK-	Washington Mutual Bank,
23	WAMU425	4444-007542-5
24	Pages: 00001 -	(GARRETT'S TAX & ACCTG. SERVICE / FE S GARRETT)
25	00007	
26		
27		

1 FG-BK-	Washington Mutual Bank,
2 WAMU441	444-007544-1
3 Pages: 00002 -	(GARRETT'S REALTY & MORTGAGE / FE S GARRETT)
4 00035	
5 FG-BK-	Washington Mutual Bank,
6 WAMU934	387-485493-4
7 Pages: 00001 -	(GREGORY GARRETT JR)
8 00392	
9 FG-AM-2	American Mortgage Network, Inc.
10 Pages: 0008 - 0009	List of Loans Originated by Garrett's Realty & Mortgage
11 FG-SP	Sierra Pacific Mortgage
12 Page: 0002	Check Register for All Checks Issued to Garrett's Realty & Mortgage
13 FG-TI	First American Title
14 Pages: 0002 - 0006	Disbursement Reports and Checks Issued to Garrett's Realty & Mortgage
15 FG-TI	Commonwealth Land Title Company
16 Pages: 0008-0010	Escrow Ledger and Checks Issued to Garrett's Realty & Mortgage
17 FG-TI	Laurel Hill Escrow Services, Inc.
18 Pages: 0012 - 0013	Checks Issued to Garrett's Realty & Mortgage
19 FG-TI	Southland Title
20 Pages: 0015 - 0027	Settlement Statement, Disbursement Report, Copies of Checks Issued to Garrett's Realty & Mortgage
21 FG-TI	West Coast Escrow
22 Pages: 0036 - 0052	Settlement Statements, Records of Disbursements

24 On April 23, 2008, defendant was provided the business records and the certifications from
 25 Bank of America, Comerica Bank^{3/}, North Island Credit Union, Placer Sierra Bank (Southwest

26
 27 ^{3/}The Comerica Bank records were provided on April 23, 2008. We are waiting for the
 (continued...)

Community Bank), Washington Mutual Bank and Sierra Pacific Mortgage⁴. The business records and certification of American Mortgage Network were provided to defendant on April 23, 2008 with further production on June 16, 2008. On June 12, 2008 defendant was provided the business records and certifications of First American Title, Commonwealth Land Title, Laurel Hill Escrow Services, Inc., Southland Title and Westcoast Escrow Company.

On July 30, 2008, Christopher Strauss, Special United States Attorney, sent a letter to defendant requesting a stipulation as to authenticity and admissibility of the above business records. On August 11, 2008, Erica Zunkel, defendant's stand-by counsel, emailed Christopher Strauss and stated that defendant "is willing to submit to the admissibility of the business records." On August 21, 2008, Erica Zunkel emailed Christopher Strauss and stated that defendant "has changed her mind about the stipulations."

12 To introduce these records at trial with live witnesses would require the government to bring
13 11 additional witnesses to San Diego. This would impose a large and unnecessary burden on the
14 witnesses and their employers.

LAW AND ARGUMENT

16 The Court may determine the admissibility of evidence before the commencement of trial.
17 Fed. R. Evid. 104. When evidence is admitted subject to the jury's finding that a threshold condition
18 is satisfied, "the judge makes a preliminary determination whether the foundation evidence is
19 sufficient to support a finding of fulfillment of the condition." United States v. Gil, 58 F.3d 1414,
20 1419 (9th Cir. Cal. 1995) *citing* Fed. R. Evid. 104(b) advisory committee's note; see United States v.
21 Reilly, 33 F.3d 1396, 1404-05 (3rd Cir. 1994) ("Once the court finds that evidence has been
22 introduced sufficient to permit a reasonable juror to find that the matter in question is what its
23 proponent claims, a sufficient foundation for introduction in evidence has been laid.")

²⁷ ^{4/}The Sierra Pacific Mortgage certification was provided to the government on August 22, 2008 and is being provided to the defendant contemporaneously.

1 The government exhibits at issue consist of the records of domestic financial institutions,
 2 including banks and mortgage companies. As such, these records are exceptions to the hearsay rule
 3 because they are records of regularly conducted activity as defined in Rule 803(6). This rule states:

4 A memorandum, report, record, or data compilation, in any form, of acts, events,
 5 conditions, opinions, or diagnoses, made at or near the time by, or from information
 6 transmitted by, a person with knowledge, if kept in the course of a regularly conducted
 7 business activity, and if it was the regular practice of that business activity to make the
 8 memorandum, report, record or data compilation, all as shown by the testimony of the
 9 custodian or other qualified witness, or by certification that complies with Rule 902(11),
 10 Rule 902(12), or a statute permitting certification, unless the source of information or the
 11 method of circumstances of preparation indicate lack of trustworthiness. The term
 12 "business" as used in this paragraph includes business, institution, association,
 13 profession, occupation, and calling of every kind, whether or not conducted for profit.

14 The Rule specifies that a live witness need not testify at trial to prove that a record qualifies
 15 under Rule 803(6), because a certification that complies with Rule 902(11) is sufficient for this
 16 purpose. The domestic financial records at issue in this motion have been certified by their
 17 custodians, pursuant to Rule 902(11) as meeting the requirements of Rule 803(6). Copies of these
 18 certifications are attached to this motion, and defendant was just given notice that the United States
 19 intended to introduce records pursuant to Rule 902(11). Accordingly, these exhibits should be
 20 admitted as both authentic and exceptions to the hearsay rule.

21 The admissibility of business records under Rules 803(6) and 902(11) and the procedure set
 22 forth in Rule 104 for determination of the preliminary questions regarding admissibility are
 23 unaffected by the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), which
 24 applies to certain hearsay. In *Crawford*, the Supreme Court held that "testimonial" hearsay may not
 25 be admitted in a criminal trial unless the declarant is unavailable and the defendant had a prior
 26 opportunity for cross-examination. However, the Court made clear that business records admitted
 27 pursuant to an evidentiary hearsay exception are not testimonial statements with which the Sixth
 28 Amendment Confrontation Clause is concerned. *Id.* at 56.^{5/}

25 ^{5/} The decision in *Crawford*, assuring a right to confront witnesses at trial, also has no bearing
 26 on the pretrial determination of admissibility authorized by Rule 104. That rule has long provided that
 27 the rules of evidence do not apply in the trial judge's determination of admissibility. Further, the
 28 Supreme Court has often held that the right of confrontation does not apply to the same extent at pretrial
 (continued...)

1 The Ninth Circuit has held that a business record is not testimonial because it is kept in the
 2 regular course of business and therefore the confrontation clause is not at issue. United States v.
 3 Evans, 178 Fed. Appx. 747, 750-751 (9th Cir. Cal. 2006) *citing* Fed. R. Evid. 803(6); Crawford v.
 4 Washington, 541 U.S. 36, 56, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); Parle v. Runnels, 387 F.3d
 5 1030, 1037 (9th Cir. 2004). Additionally, Rule 902(11) certifications are not testimonial in nature.
 6 United States v. Weiland, 420 F.3d 1062, 1077 (9th Cir. Wash. 2005); United States v. Rueda-Rivera,
 7 396 F.3d 678, 680 (5th Cir. 2005) (per curiam) (Holding that a routine certification by the custodian
 8 of a domestic public record and a routine attestation to authority and signature are not testimonial in
 9 nature.); United States v. Cervantes-Flores, 421 F.3d 825, 833 (9th Cir. 2005) (holding that a
 10 certification of the non-existence of business records under Rule 803(10) is not testimonial).

11 Here, all of the business records are admissible pursuant to Rule 803(6) and have been
 12 previously provided to defendant. Each record has been certified by a custodian of records. Those
 13 certifications also have been provided to defendant. Finally, notice has been given by the
 14 government prior to trial that we intend to admit these records pursuant to 803(6) and 902(11).
 15 Therefore, the United States has complied with the necessary rules of evidence to allow the business
 16 records to be admitted without having to physically call each custodian to testify during the trial.

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CONCLUSION

19 Accordingly, the government respectfully requests that the Court enter a pretrial order finding
 20 the government exhibits listed to be authentic and not barred by the hearsay rule pursuant to Rules
 21 803(6) and 902(11).

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⁵(...continued)

26 hearings as it does at trial. For example, the Court has held that hearsay is admissible at a pretrial
 suppression hearing. United States v. Raddatz, 447 U.S. 667, 679 (1980); States v. Matlock, 415 U.S.
 27 164, 172-75 (1974) (suppression hearing); McCray v. Illinois, 386 U.S. 300, 312-13 (1967) (probable
 cause hearing).

DATED: August 22, 2008

/s/ Elizabeth C. Hadden
Elizabeth C. Hadden
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Attorney for Plaintiff
United States of America
Email: Elizabeth.C.Hadden@usdoj.gov

/s/ Christopher S. Strauss
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 08CR0918-L

Plaintiff,)
v.)
FE S. GARRETT,)
Defendant.)

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Elizabeth C. Hadden, am a citizen of the United States and am at least eighteen years of age.

11 My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

12 I am not a party to the above-entitled action.

13 I have caused service of GOVERNMENT'S MOTION IN LIMINE TO INTRODUCE
14 BUSINESS RECORDS, pro se, by sending a copy of the motion via Federal Express on August 22, 2008
15 to Defendant at the following address:

17 Fe Garrett
The Geo Group
18 Reg. # 0799-0298
Western Region Detention Facility
19 220 West C Street
San Diego, CA 92101

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4 I have caused service of GOVERNMENT'S MOTION IN LIMINE TO INTRODUCE
5 BUSINESS RECORDS on Defendant's standby counsel by electronically filing the foregoing with the
6 Clerk of the District Court using its ECF System, which electronically notifies them:

7

8 Erica Kristine Zunkel
Erica_zunkel@fd.org
9 Federal Defenders of San Diego
225 Broadway, Suite 900
10 San Diego, CA 92101

11

I declare under penalty of perjury that the foregoing is true and correct.

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Executed on August 22, 2008.

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/s/ Elizabeth C. Hadden
ELIZABETH C. HADDEN
Special Assistant United States Attorney

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